ONG BAW SENG

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, MUAR
EUSOFF CHIN J
[CRIMINAL APPEAL NO. 51-34/87]
14 FEBRUARY 1988

CRIMINAL LAW AND PROCEDURE: *Gaming - Offence under s. 4(1)(c) Common Gaming Houses Act 1953 - Illegal character lottery - Gaming expert not called to give evidence at trial - Certificate of gaming expert states master charts and records of stakes examined relating to illegal character lottery - Certificate served on accused - Accused served on DPP notice requiring presence of maker of certificate - Expert not called to give evidence - Whether Magistrate should have rejected certificate since maker not called to give evidence.*

This was an appeal by the appellant against the decision of the Magistrate who found the appellant guilty under s. 4(1)(c) of the Common Gaming Houses Act 1953 and sentenced him to one day's imprisonment and a fine of RM8,000.

The main ground of appeal was that the gaming expert was not called to give evidence at the trial despite the notice served on the DPP by the accused requiring the presence of the maker of the certificate.

Held:

[1] Section 11(5) of the Common Gaming Houses Act is clear that the gaming expert need not be called to give evidence by the prosecution and that his certificate given under s. 11(3) of the Act was admissible in evidence.

[2] However, the gaming expert's certificate cannot be admitted in evidence where the Court requires the expert to be present as a witness, or where the accused person has given proper notice in writing requiring the expert to be present as a witness. Under the circumstances the certificate Exhibit P2 should have been rejected by the Court. The prosecution had therefore failed to prove a prima facie case against the accused.

[3] The trial Magistrate should have acquitted the Accused at the end of the prosecution case. The appeal was allowed and the appellant acquitted.

[Appeal allowed. Appellant acquitted. Fine ordered to be refunded.]

Case referred to:
Chah Siew Kok v. PP [1987] CLJ (Rep) 518

Legislation referred to:
Common Gaming Houses Act 1953, ss. 4(1)(c), 11(3), (5)
Criminal Procedure Code, s. 339

For the appellant - G.F. Nelson; M/s. G.F. Nelson & Co.
For the respondent - Nor Afizah Anum, DPP

JUDGMENT

Eusoff Chin J:

The accused Ong Baw Seng was charged under s. 4(1)(c) of the Common Gaming House Act 1953 (hereinafter referred to as 'the Act'). He was found guilty by the Magistrate's Court, was convicted and sentenced to one day's imprisonment and a fine of RM8,000. The accused appealed against the conviction and sentence.

The main ground of appeal is that the gaming expert was not called to give evidence at the trial. The gaming expert had given a certificate under s. 11(3) of the Act to certify that the documents he had examined were master charts and record of stakes relating to illegal character lottery.

The certificate was properly served upon the accused person under s. 11(5) of the Act. About five months before the trial, the defence Counsel had served on the Deputy Public Prosecutor a notice under s. 11(5)(b) of the Act requiring the presence of the maker of the certificate.

At the hearing, the Magistrate admitted the certificate given by the gaming expert as Exhibit P2. The expert was not called to give evidence although the Deputy Public Prosecutor had directed the relevant OCPD to call the gaming expert to give evidence.

At the hearing of the appeal, the learned defence Counsel submitted that the certificate, Exhibit P2, should have been rejected by the Magistrate's Court since the maker was not called to give evidence. The learned Deputy Public Prosecutor submitted that the Court was satisfied with the authenticity of the certificate, and in any event if the Court was not so satisfied, the Court could have required the presence of the maker of the certificate to be a witness in Court.

Section 11(3) and (5) of the Act states:

> 11(3) Where evidence or a certificate is given by a gaming expert that any document produced before the Court is a lottery ticket of any public lottery or is an account memorandum riddle or record of stakes or wagers in or relating to any public lottery, the Court shall presume that such a document is a lottery ticket of such public lottery or an account, a memorandum, riddle or record of stakes or wagers in or relating to such public lottery, as the case may, be.
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> (5) A certificate given under subsection (3) shall, where the prosecution intends to give it in evidence, be served upon the accused not less than fourteen clear days before the commencement of the trial and the certificate shall be admissible without the presence of the maker therefore as witness unless so required:
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> a. by the Court; or
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> b. by the accused in which case the accused shall give the Public Prosecutor a notice in writing not less than seven clear days before the commencement of the trial.

Section 11(5) of the Act is clear that the gaming expert need not be called to give evidence by the prosecution and that his certificate given under s. 11(3) of the Act is admissible in evidence.

However, the gaming expert's certificate cannot be admitted in evidence where the Court requires the expert to be present as a witness, or where the accused person has given proper notice in writing requiring the expert to be present as a witness. Under the circumstances the certificate Exhibit P2 should have been rejected by the Court. The prosecution therefore had failed to prove a *prima facie* case against the accused.

In *Chah Siew Kok v. PP* [1987] CLJ (Rep) 518, a chemist report was served on the defendant who then gave notice to the prosecution under s. 399 of the Criminal Procedure Code requiring the presence of the chemist at the trial. The chemist was not called to give evidence at the trial. Peh Swee Chin J held the chemist report was inadmissible in evidence.

The learned Deputy Public Prosecutor persuaded me to order a retrial because the failure to call the gaming expert was an oversight on the part of the prosecuting officer in the Magistrate's Court. With respect, I am unable to agree to this suggestion.

I find the only defect in the prosecution case is the failure to call the gaming expert, and to order a retrial would be giving a second chance to the prosecution to prove their case.

The trial Magistrate should have acquitted the accused at the end of the prosecution's case.

I therefore allowed the appeal, and acquitted the accused. The fine paid by the accused should now be refunded to him.

Also found at [1988] 1 CLJ 355